No. 82-1281

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

SHELLY & SANDS, INC. and
BUCKEYE UNION INSURANCE CO.,

Appellants,

v.

COMMONWEALTH OF PENNSYVLANIA,
DEPARTMENT OF TRANSPORTATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. If a state statute generally extends the benefits of the withdrawal of bids in the event of arithmetical error to all contractors bidding on public construction work, and excludes from those benefits only bidders on highway construction work, is this exclusionary classification so arbitrary or irrational as to violate the Equal Protection Clause of the Fourteenth Amendment?

2. If the general purpose of the withdrawal of bids legislation is clear, and the exclusion of only one classification of persons affected thereby is patently inconsistent with that general purpose and is not in any way explained or justified in the legislation itself or in the legislative history, should a reviewing court hypothesize as to the reason for the inconsistent exclusionary

classification in determining whether that classification is fairly and substantially related to the general legislative purpose?

PARTIES TO THE PROCEEDING BELOW

All of the parties before the Pennsylvania Supreme Court are listed in the caption.

Appellant Shelly & Sands, Inc. has no parent or affiliate companies. All of its subsidiary companies are wholly owned.

Appellant Buckeye Union Insurance Co. is a subsidiary of The Continental Corporation. It has no subsidiary companies. Its affiliates are Boston Old Colony Insurance Co., Fireman's Insurance Co., The Fidelity & Casualty Co., The Glens Fall Insurance Co., National-Ben Franklin Companies, Niagara Fire Insurance Co., Pacific Insurance Co. and Seaboard Fire & Marine Inspection Co.

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OPINION BELOW

The judgment of the Supreme Court of Pennsylvania (App. A, 1a) was entered November 4, 1982, without opinion, and affirmed the Order of the Commonwealth Court of Pennsylvania dated April 15, 1981 (App. B, 2a). That order was followed by the Memorandum Opinion of Judge Robert W. Williams, Jr. (App. C, 3a) which is not reported.

JURISDICTION

This is an appeal from the final judgment of the Pennsylvania Supreme Court. The Pennsylvania Commonwealth Court had, in effect, upheld the validity of a Pennsylvania statute which extended the right of bid withdrawal to bidders on all public construction work, excepting highway work only. The Commonwealth Court rejected

appellants' constitutional argument that they were denied equal protection of the laws by reason of the statute's exclusionary classification. The Commonwealth Court's order was affirmed by judgment of the Pennsylvania Supreme Court dated November 4, 1982 and entered without opinion. Appellants filed a Notice of Appeal to this Court with the Prothonotary of the Pennsylvania Supreme Court on January 26, 1983 (App. D, 10a). Jurisdiction is conferred on this Court by 28 U.S.C. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part at Section 1:

"No State shall . . . deny

to any person within its jurisdiction the equal protection of the laws."

The Act of January 23, 1974, P.L. 9, No. 4, §2, 73 P.S. 1602, known as the Pennsylvania Public Contracts Act, provides in relevant part:

"A bidder to any construction contract for the construction, reconstruction, demolition, alteration or repair of any public building or other public improvement or for the provision of services to or lease of real or personal property whether by lease or concession from such contracting body, excepting highway work, may withdraw his bid from consideration after the bid opening without forfeiture of the certified check,

bank cashier's check, surety bid bond or other security filed with the bid if the price bid was submitted in good faith, and the bidder submits credible evidence that the reason for the price bid being substantially lower was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional and substantial arithmetical error or an unintentional omission of a substantial quantity of work, labor, material or services made directly in the compilation of the bid; provided, (i) notice of a claim of the right to withdraw such bid is made in writing with the contracting body within two business days after the opening of bids; and (ii) the

withdrawal of the bid would not result in the awarding of the contract on another bid of the same bidder, his partner, or to a corporation or business venture owned by or in which he has a substantial interest. . ."

STATEMENT OF THE CASE

This case arises from an Order of the Commonwealth Court of Pennsylvania, affirmed by the Supreme Court of Pennsylvania, refusing to open a judgment entered by confession against appellants on a bid bond given with a bid submitted to the Pennsylvania Department of Transportation (PennDOT).

Appellant Shelly & Sands, Inc. submitted a good faith bid to PennDOT for the

improvement of a portion of Interstate Route I-70 in southwestern Pennsylvania. The bid was accompanied by a bid bond executed by it, as principal, and by appellant Buckeye Union Insurance Company, as surety, in the amount of $207,679.05.

The bids for this highway construction work were opened on September 18, 1980. The Shelly & Sands low bid, in the amount of $4,153,518.10, was some $800,000 below that of the next low bidder in a range of bids up to approximately $5,900,000.00. Shelly & Sands immediately reviewed its bid and noted that the unit price included for paved shoulders (Item No. 656-0001) was $5.25 per square yard, which is much less than its cost of the materials alone. A review of its calculations disclosed that Shelly & Sands' estimator had

made an arithmetical error in converting to the cost per square yard from the cost per cubic yard.[1] The difference in the bid resulting from this error was a substantial amount, $190,365.00. Later, it was also discovered that Shelly & Sands inadvertently had not included the Pennsylvania sales tax on materials in calculating its bid. The practice in other states is to exempt materials purchased for state highway projects from sales taxes.

Within two (2) business days after the bid opening, Shelly & Sands hand-delivered a letter to PennDOT withdrawing

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1. The other states in which Shelly & Sands performs highway work call for bids for this item to be submitted on a cubic yard rather than on a square yard basis. This was the first bid that Shelly & Sands had ever submitted on a Pennsylvania highway project.

its bid, pointing out the mistakes and explaining how they occurred. Thereafter, a letter was received from PennDOT awarding the contract to Shelly & Sands at bid price and advising that Pennsylvania laws did not permit withdrawal of the bid after opening.

Shelly & Sands refused to undertake the project on which the bid mistake had occurred, and PennDOT caused judgment to be confessed against Shelly & Sands and its surety in the full amount of the bid bond, plus fees, or $228,446.97. Shelly & ands and the surety, Buckeye Union Insurance Company, then filed a Petition for Rule to Show Cause Why Judgment Should Not Be Opened in the Commonwealth Court of Pennsylvania.

Argument was held on the issues raised by the Petition and Answer before

the Honorable Robert W. Williams, Jr., Judge of the Commonwealth Court. The facts were placed before the Court on a formal stipulation of the parties and on the affidavits of their respective officers and administrators. On April 15, 1981, the Commonwealth Court entered an Order (App. B, 2a) denying the Petition to Open Judgment. Upon Shelly & Sands' ensuing appeal, Commonwealth Court Judge Robert W. Williams, Jr. wrote and filed a Memorandum Opinion (App. C, 3a) holding that no factual issue could be found which would justify opening judgment and, further, that the exclusion of highway contractors from the bid withdrawal benefits of the Pennsylvania Public Contracts Act (Act of January 25, 1974, P.L. 9, No. 4, §2, 73 P.S. 1602) did not deprive Shelly & Sands of equal protection of

the laws.

On appeal to the Supreme Court of Pennsylvania, that court entered final judgment (App. A, 1a) dated November 4, 1982 affirming the Commonwealth Court order.

THE QUESTIONS ARE SUBSTANTIAL

Pennsylvania's attempt to secure limited economic benefits to firms bidding on public construction projects raises fundamental questions under the Equal Protection Clause of the Fourteenth Amendment. Generally, the Public Contracts Act simply provides economic relief to firms bidding on public construction projects when it is discovered in a timely fashion that a low bid submitted in good faith is somehow erroneous by reason of clerical mistake and unintentional and substantial arithmetical error. When this occurs, the

bidder may withdraw the bid without forfeiture of its check, bond or other security. The fundamental question arises with the solitary exclusion of firms which bid on highway construction work.

This state legislation deals solely with economic benefits and limitations. The Pennsylvania Public Contracts Act concededly does not create "suspect" classifications such as race or national origin, nor does it impinge on traditionally "fundamental" constitutional rights such as travel or privacy. What the Act does is deny to highway contractors a right of bid withdrawal on public construction work which it creates and extends to other contractors bidding on all other kinds of construction work. Under these circumstances, the constitutional legitimacy of the Act as measured against the proscription of the Equal Protection Clause is not to be determined under the stringent judicial

scrutiny standard utilized in suspect classification and fundamental rights cases. See San Antonio School Board v. Rodriguez, 411 U.S. 1, 17, 93 S.Ct. 1278, 1288 (1973), Dandridge v. Williams, 397 U.S. 471, S.Ct. 1153 (1970). Instead, the proper standard for review is the "rational basis" test. See Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 943 (1979), City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516 (1976).

To state that "rational basis" is the standard for review does not however give precise meaning to that standard. This Court has not been entirely consistent in its evaluation and applications of the "rational basis" test. The Court so noted in U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75, 101 S.Ct. 453, 459 (1980), where it stated: "In Lindsley

v. National Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911), the Court said that 'when the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time that the law was enacted must be assumed.' On the other hand, only nine years later in Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920), the Court said that for a classification to be valid under the Equal Protection Clause it 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation....'"

The Court in Fritz also noted its pronouncement on "rational basis" made earlier in Dandridge v. Williams, 397 U.S.

471, 485, 90 S.Ct. 1153, 1161 (1970) where the Court stated: "In the area of economic and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369...."

On the other hand, the Court has also said: "At the minimum level, this Court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." Schweiker v. Wilson, 450 U.S. 221, 230, 101 S.Ct. 1074,

1080 (1981). Further, it has said that "the classificatory scheme must 'rationally advanc[e] a reasonable and identifiable governmental objective.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 439, 102 S.Ct. 1148, 1160 (1982) (separate opinion of Justice Blackmun) quoting Schweiker v. Wilson, 450 U.S. at 235, 101 S.Ct. at 1083. And it has also held: "The Equal Protection Clause...does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be

treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920)." Reed v. Reed, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253-54 (1971).

The Pennsylvania act is generally sweeping in its extension to bidders on any public construction work of the right to withdraw a bid from consideration without forfeiture in the event of clerical mistake and substantial arithmetical error. In the instant case, the appellant-contractor's bid withdrawal was timely and in compliance with all other provisions of the act but one. The bid was for highway construction work which is the sole stated exception to the right of withdrawal. In other words, under this legislation, highway contractors are placed in one classification of bidders and are denied the right to withdraw a

bid without forfeiture. All other contractors are placed in another classification and are accorded the right to withdraw a bid without forfeiture under stated circumstances. The act itself contains no statement of the purpose of the solitary exclusion as to highway construction work. There is nothing apparent from or implicit in the statutory classification scheme which rationally explains the discrimination between bidders similarly circumstanced or which justifies treating bidders on public highway work different from bidders on all other public construction work. Finally, there is nothing reported in the respective Legislative Journals of the Pennsylvania Senate and House of Representatives which affords any clue to a rational purpose behind the highway

construction work exclusion from the otherwise universal right of bid withdrawal under the act.

It is apparent from the face of the statute that the legislative objective is to provide a limited opportunity to escape the disastrous financial consequences of submitting in good faith a substantially lower bid on a public works project due to a clerical mistake. It is not apparent -- nor is it stated directly or otherwise -- how the exclusion of one classification of contractors from this salutary opportunity can further or abet that legislative objective. To the contrary, the exclusion of only one category of contractors without explanation or expressed justification is patently antithetical to the legislative objective. Stated another way, this exclusion rests on no difference which has a fair and

substantial relation to the objective of the legislation. Hence, the legislative classification between highway contractors and all other contractors is utterly arbitrary and invidious even under the relaxed standards of judicial scrutiny applicable to economic interest cases under the Equal Protection Clause.

Because there is no legislative history explaining or justifying the exclusion of highway contractors under the Pennsylvania bid withdrawal legislation, the pronouncements of Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715 (1981) are not apposite here. There the Court noted that the burden is on those challenging the legislative judgment to convince the Court that the facts supposedly supporting the classification could not reasonably be conceived to be true by the governmental

decisionmaker. The difference here is that there are no known or apparent facts on which the exclusionary classification as to highway contractors is based, and there was no known evidence before the legislature reasonably supporting the exclusionary classification. The exclusion of highway contractors from the bid withdrawal right is inexplicably but obviously inconsistent with the apparent legislative objective; and it is not possible to conclude that the Pennsylvania legislature could rationally have decided that its discriminatory treatment of highway contractors might enhance the generally ameliorative impact of its enactment.

The total absence of any indication of the legislative purpose behind the exception to the bid withdrawal legislation -- where the general objective of the

statute is clear on its face -- sets this case apart from the other economic interest cases recently before the Court on an equal protection issue. In this connection, the view of Justice Powell, dissenting in Schweiker v. Wilson, 450 U.S. 221, 243-45, 101 S.Ct. 1074, 1087-88, is pertinent. There, it was noted that members of the Court continue to hold differing views on the clarity with which a legislative purpose need be evident; and it was stated:

> ".... When a legitimate purpose for a statute appears in the legislative history or is implicit in the statutory scheme itself, a court has some assurance that the legislature has made a conscious policy choice. Our democratic system requires that legislation intended to serve a discernable purpose receive the most respectful deference. [citations omitted] Yet, the question of whether a statutory classification discriminates arbitrarily cannot be divorced from whether it was enacted to serve an identifiable purpose. When a legislative

> purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence.
>
> "In my view, the Court should receive with some skepticism post hoc hypotheses about legislative purpose, unsupported by the legislative history. When no indication of legislative purpose appears other than the current position of the Secretary, the Court should require that the classification bear a 'fair and substantial relation' to the asserted purpose. See Royster Guano v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561 64 L.Ed. 989 (1920). This marginally more demanding scrutiny indirectly would test the plausibility of the tendered purpose, and preserve equal protection review as something more than 'a mere tautological recognition of the fact that Congress did what it intended to do.' Fritz, supra, 101 S.Ct. at 461 (STEVENS, J., concurring)."

This is an instance where a legitimate purpose for the general bid withdrawal right is implicit in the statute even though no supporting legislative history is articulated. At least, this

Court or any court has some assurance that the legislature had indeed made a conscious economic policy choice in generally ameliorating the disasterous impact of inadvertent error in submitting public construction bids. There is no reason at that point not to accord the legislation full deference. But the legislature did not stop with creation of a general right having an implicit identifiable purpose. It also carved out an exclusion to the benefits of its general economic policy. That exclusion on its face is not a temporary measure or one phase of a step-by-step measure. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513 (1976). The exclusion of highway contractors is permanently engrafted in the legislation and runs utterly contrary to the implicit

ameliatory economic policy effectuated generally by the statute. There is no evidence that the legislature had a legitimate goal or purpose in establishing the exclusionary classificaton and no evidence that it ever considered competing factors to arrive at a social or economic rationale for doing so. The exclusion engrafted by Pennsylvania in this situation is not only unexplained, it is nonsensical and contradictory in view of the general thrust of the statute.

If, as articulated in Weinberger v. Weisenfeld, 420 U.S. 636, 648, n.16, 95 S.Ct. 1225, 1233, n.6 (1975), this Court "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose

could not have been a goal of the legislation....," then surely it need not and ought not to accept hypotheses of counsel as to purpose where a comparison of the unexplained exclusionary scheme with the general provisions of the legislation demonstrates that the single exclusion is antithetical to the implicit goal of the amelioratory legislation.

Here, the general legislative purpose is indeed identified, but that of the exclusionary classification is not. The exclusion of highway contractors fails utterly to further the identified purpose of the statute generally, and is otherwise baldly discriminatory. It should be struck down consistent with the standard enunciated in Schweiker v. Wilson, 450 U.S. 221, 230 101 S.Ct. 1074, 1080 (1981), requiring at minimum level a classification rationally related to the legitimate

statutory objective.

CONCLUSION

For these reasons, the appellants urge that the Court note probable jurisdiction.

Respectfully submitted,

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Counsel for Appellants

APPENDIX A

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 81-1-26

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,

vs.

SHELLY & SANDS, INC., and
BUCKEYE UNION INSURANCE CO.,

Appellants.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Commonwealth Court be, and the same is, hereby affirmed.

BY THE COURT,

/s/ Carl Rice
Carl Rice, Esquire,
Prothonotary

Dated: November 4, 1982

APPENDIX B

IN THE COMMONWEALTH COURT

OF PENNSYLVANIA

No. 23 G.D. 1981

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,

Plaintiff,

vs.

SHELLY & SANDS, INC., and
BUCKEYE UNION INSURANCE
COMPANY,

Defendants.

O R D E R

AND NOW, this 15th day of April, 1981, the Petition to Open Judgment in the above-captioned case is hereby denied.

/s/ Robert W. Williams, Jr.
ROBERT W. WILLIAMS, JR., JUDGE

APPENDIX C

IN THE COMMONWEALTH COURT

OF PENNSYLVANIA

No. 23 G.D. 1981

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,

Plaintiff,

vs.

SHELLY & SANDS, INC., and
BUCKEYE UNION INSURANCE
COMPANY,

Defendants.

BEFORE: HONORABLE ROBERT W. WILLIAMS,
JR., Judge

HEARD: April 14, 1981

CERTIFIED FROM THE RECORD

Jun 8 1981

/s/ Francis C. Barbush,
Chief Clerk

MEMORANDUM OPINION BY JUDGE WILLIAMS, JR.

Filed June 8, 1981

On April 15, 1981, this Court issued an Order denying a Petition to Open Judgment filed by Shelly & Sands, Inc. (S & S), defendants in this action. This Memorandum Opinion is written in compliance with Pa. R.A.P. 1925, pursuant to an appeal of that decision to the Pennsylvania Supreme Court.

On September 18, 1980, the Commonwealth of Pennsylvania, Department of Transportation (PennDOT) opened all the bids submitted relative to a state highway project. The bid from S & S was the lowest by approximately $800,000.00 in a range of bids from $5.9 million to $4.1 million.

Within two business days after the

bid opening, S & S hand-delivered a letter to PennDOT withdrawing the bid because "the total tons of asphalt concrete required . . . was erroneously calculated," which error caused the unit price per square yard of asphalt to be estimated at $5.25 per unit instead of $10.50 per unit, which, S & S alleges, was the intended price. On October 29, 1980, S & S received a letter from PennDOT awarding the contract to it at bid price, and advising it that the bid could not be withdrawn after opening, pursuant to the provisions of Section 102.10 of Form 408, "Bidding Requirements and Conditions, Withdrawal of Proposals."

S & S refused to undertake the project. PennDOT subsequently filed suit in this Court, praying for judgment against S & S in the amount of the bond which it

posted with its bid, and confessed judgment against S & S in the amount of that bond, $228,446.97. S & S filed a Rule to Show Cause why that judgment should not be opened, averring that its withdrawal of the bid is permitted by the language of Section 2 of the Act of January 23, 1974, P.L. 9, 73 P.S. §1602, which permits a bidder on a public contract to withdraw his bid withint two business days of the opening thereof. However, that statute specifically excepts highway work from its purview.

S & S additionally argues that, since a factual issue exists as to whether the mistake in the bid was obvious, the judgment should be opened. Its basis for this argument is Pa. R.C.P. No. 2959(e), which requires the court to open judgment if the evidence would require submission of the

issue to the jury in a jury trial. However, this Court notes that there are numerous discrepancies in the unit prices of the various bids, similar to or greater than that put forth by S & S as the "obvious" error. PennDOT cannot be charged with the obligation to verify the accuracy of such discrepancies prior to accepting a bid. In light of the bid-breakdown tables provided to the Court in the stipulation of the parties, we cannot find that there is a factual issue which would activate the application of the above rule.

The next contention of S & S is that the exclusion of highway contractors from the benefit of the bid withdrawal provisions of 73 P.S. §1602 is a denial of equal protection. We find that argument to be without merit. Unlike other public contracts, highway projects are adminis-

tered by PennDOT. That simple fact sets such undertakings apart from other public contracts, which do not involve that agency's procedures. We cannot find merit in the constitutional argument asserted here.

In Travelers Indemnity Co. v. Susquehanna County Commissioners, 17 Pa. Commonwealth Ct. 209, 211-12, 331 A.2d 918, 920 (1975), this Court stated:

> A firm bid rule has long been established in this Commonwealth. It declares that if a contractor discovers a clerical error in the bid any time after the bid opening, he is not entitled to withdraw his bid without forfeiting his bid bond as liquidated damages. . . .
>
> The conditions of forfeiture are included in the instruction to bidders, all of which, of course, form a material part of the contract between the parties.

In the instant case, the provisions of the section of the bid instructions entitled "Withdrawal of Proposals" clearly

states: "Each and every bidder who submits a bid specifically waives any right to withdraw it," unless such withdrawal is made or confirmed in writing "before the hour of the date specified in the proposal for the opening there." This language, as a portion of the instruction to bidders, is a "material part of the contract between the parties," Travelers Indemnity, and thus precludes withdrawal two days after the bids have been opened and read.

We therefore deny the Petition to Open Judgment.

/s/ Robert W. Williams, Jr.
ROBERT W. WILLIAMS, JR., JUDGE

APPENDIX D

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 81-1-26

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,

Appellee,

vs.

SHELLY & SANDS, INC., and
BUCKEYE UNION INSURANCE CO.,

Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that SHELLY & SANDS, INC., and BUCKEYE UNION INSURANCE CO., appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Pennsylvania entered November 4, 1982, affirming the judgment of the Commonwealth Court which denied appellants'

petition to open judgment.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

PLOWMAN AND SPIEGEL

By /s/ Jack W. Plowman
Jack W. Plowman
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Dated; January 26, 1983

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the within Notice of Appeal to the Supreme Court of the United States has been made on all parties required to be served. Service on the appellee herein, Commonwealth of Pennsylvania, Department of Transportation, has been effected by directing a true and correct copy of the Notice of Appeal, via First Class Mail, postage prepaid, to its counsel of record:

George D. Wenick
Assistant Counsel
Commonwealth of Pennsylvania
Department of Transportation
Office of Chief Counsel
Harrisburg, Pennsylvania 17120

PLOWMAN AND SPIEGEL

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Dated: January 26, 1983

No. 82-1281

In the Supreme Court of the United States

October Term, 1982

SHELLY & SANDS, INC. and
BUCKEYE UNION INSURANCE CO.,
Appellants

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION,
Appellee

On Appeal From the Supreme Court of Pennsylvania

MOTION TO DISMISS

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

SHELLY & SANDS, INC. and
BUCKEYE UNION INSURANCE CO.,
Appellants

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION,
Appellee

On Appeal From the Supreme Court of Pennsylvania

MOTION TO DISMISS

The Department of Transportation of the Commonwealth of Pennsylvania moves the Court to dismiss the appeal herein on the grounds that the decision of the Pennsylvania Supreme Court sought to be reviewed rests on adequate non-federal grounds.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of certain provisions of the Pennsylvania Public Contracts Act (Act of January 23, 1974, P.L. 9, No. 4, §2, 73 P.S. 1602).

The statute provides that bidders on public works projects may withdraw their bids without forfeiture on the condition that they provide to the entity inviting bids, timely notice and credible evidence that the bid price was substantially lower due to a clerical mistake or arithmetical error. The statute expressly excludes bidders on highway construction projects from its benefits.

B. The Proceedings Below

The Appellants, Shelly & Sands, Inc. (Shelly & Sands) and Buckeye Union Insurance Company (Buckeye Union), are a highway contractor and its surety, respectively. Shelly & Sands submitted to the Pennsylvania Department of Transportation the low bid for a highway construction project. When Shelly & Sands was awarded the contract, it refused to sign the agreement, complaining that its bid was substantially lower than intended due to errors it committed in the preparation of the bid. The Department then caused judgment to be confessed against Shelly & Sands and Buckeye Union in the Pennsylvania Commonwealth Court, for the amount of the bid bond plus fees.

Contending that the provision of the Pennsylvania Public Contracts Act excluding bidders on highway projects from its benefits was invalid under the Pennsylvania and Federal Constitutions, the Appellants petitioned the Pennsylvania Commonwealth Court for a rule to show cause why the judgment should not be opened. After receiving evidence, Commonwealth Court Judge Robert W. Williams, Jr., wrote an unreported opinion in support of his April 15, 1981 order refusing to open the judgment. That opinion held that no factual issues could be found to justify the opening of the judgment, that the exclusion of highway contractors did not deprive Appellants of equal protection of the laws, and that, in any event, Shelly & Sands expressly waived its right to withdraw its bid, except pursuant to the provisions contained in the bidding materials. On appeal to the Pennsylvania Supreme Court, that court on November 4, 1982, affirmed the Commonwealth Court's order, *per curiam* and without opinion.

II. ARGUMENT

The Decision of the Pennsylvania Supreme Court Rests on Adequate Non-Federal Grounds

This Court has established "the settled rule that when the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). In applying this rule, the Court has refused to review the denial of a petition for habeas corpus, because it might have rested on the non-federal ground that the reasons set forth in the petition should have been raised in a previous proceeding, *Durley v. Mayo*, 351 U.S. 277 (1956), rehearing denied 352 U.S. 854 (1956), and the determination that property owners could not challenge the validity of a special assessment, because the determination rested on the non-federal ground of laches. *Utley v. City of St. Petersburg, Florida*, 292 U.S. 106 (1934).

In our case, the Pennsylvania Commonwealth Court upheld the validity of the Pennsylvania Public Contracts Act, but also found against the Appellants on the independent non-federal ground that Shelly & Sands expressly waived any right to withdraw its bid except pursuant to certain procedures, writing:

> In the instant case, the provisions of the section of the bid instructions, entitled "Withdrawal of Proposals" clearly states: "Each and every bidder who submits a bid specifically waives any right to withdraw it," unless such withdrawal is made or confirmed in writing "before the hour of the date specified in the proposal for the opening thereof." *This language* is a "material part of the contract between the parties," (citation omitted) and thus *precludes withdrawal two days after the bids have been opened.* (Opinion, P. 3, Appendix C to Appellants Jurisdictional Statement, p. 9a.) (Emphasis added.)

The Commonwealth Court's finding on this point is consistent with established state law that one may waive by agreement the benefits of a statutory provision, if the matter "is not so important as to command the general interest of the body politic as a whole and is of interest to but a class thereof." *Williams v. Wenger,* 319 Pa. 73, 77, 179 A. 242, 244 (1935).

Although the Pennsylvania Supreme Court did not give the grounds for its order of affirmance, which Appellants seek to have reviewed, it might have rested that order on a non-federal ground. Consequently, this court lacks jurisdiction, because:

> Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. Stembridge v. State of Georgia, 343 U.S. 541, 547 (1952).

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed.

Respectfully submitted,
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No. 82-1281

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

SHELLY & SANDS, INC. and
BUCKEYE UNION INSURANCE CO.,

Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF PENNSYLVANIA

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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SUMMARY OF ARGUMENT

The Appellee asserts in its Motion to Dismiss that the Pennsylvania Commonwealth Court "also found against the Appellants on the independent non-federal ground that Shelly & Sands expressly waived any right to withdraw its bid except pursuant to certain procedures...." (Motion to Dismiss, p. 4)

This "non-federal" finding by the Pennsylvania Commonwealth Court cannot be supported by reference to the evidence that was before it. The Court considered certain provisions of the bid instructions section entitled "Withdrawal of Proposals," but it failed to consider other critical provisions of that section. The result was patent error. It cannot rationally be advocated that the Pennsylvania Supreme

Court "might" have rested its judgment on a non-federal ground which is patently erroneous, particularly when the federal ground for judgment -- although considered here to be likewise erroneous -- was at least colorable. Accordingly, this Court should address the federal constitutional issue explicated in Appellants' Jurisdictional Statement.

SUPPLEMENT TO STATEMENT OF THE CASE

The Commonwealth Court referred to certain provisions of the subject bid instructions entitled "Withdrawal of Proposals." It did not, however, refer to or quote all of the relevant provisions of that particular section. These relevant provisions are set forth as follows:

"102.10 WITHDRAWAL OF PROPOSALS - Each and every bidder who submits a bid specifically waives any right to withdraw it, except as hereinafter provided. Bidders will be given permission to withdraw any proposal after it has been deposited with the Department, provided the bidder makes his request by telephone, telegraph, or in writing to the Secretary. All requests pertaining to the withdrawal shall reach the office of the Secretary not later than 9:00 A.M. on the date set for the opening thereof. Requests by telephone or telegraph shall be confirmed in writing by the bidder, either in person, or by an accredited personal representative, before the hour of the date specified in the proposal for the opening thereof.

"A bidder will be permitted to withdraw any bids which have not been read after he has been declared the apparent low bidder on any other project. In withdrawing bids, the bidder shall make his request to the official in charge of the letting, either in person, or by a duly authorized representative, who shall submit satisfactory credentials showing his authority to act for the bidder interested, at the time that the official in charge requests that any contemplated withdrawals be made and before any proposals on such projects are read. The proposal covered by such requests will be returned to the bidder or his representative, together with the proposal guaranty, and will not be considered thereafter by the Department." (Emphasis added.)

The Commonwealth Court did not refer to the emphasized portions of the withdrawal provisions, and failed to impart meaning to those portions.

ARGUMENT

Because the Commonwealth Court misconstrued the waiver language contained in the bid instructions, any "non-federal" basis for denying relief to Appellants was meritless; hence, the Pennsylvania Supreme Court could not have rested its judgment of affirmance on a "non-federal" ground.

The section of the bid instructions (102.10) which the Commonwealth Court refers to is not a waiver provision at all. It is a withdrawal of bid provision under the contract specifications. Its effect is to <u>permit withdrawal generally</u> until the date set for bid opening, and

no later, provided certain procedures are followed. The use of the phrase "waives any right to withdraw it" is merely a clumsy and improvident way of stating that the particular right of bid withdrawal which is afforded under the contract specifications expires on the date set for bid opening.

Analyzed in context, section 102.10 is a permissive section and not a restrictive one. There is no true waiver of rights, but merely a mode and time limitations on the withdrawal provision.

There is yet another error in the Commonwealth Court's treatment of the section 102.10 "Withdrawal of Proposals." On its face, section 102.10 deals solely with pre-bid opening withdrawals. It does not purport to deal with extraordinary post-bid opening withdrawals. Only the Pennsylvania legislature purports to

deal with and does deal with post-bid opening withdrawals as set forth in the Pennsylvania Public Contracts Act (Jurisdictional Statement, pp. 3-5). These are two distinct withdrawal rights -- one a general right created by contract provisions, and the other a limited and extraordinary right created by legislative enactment to redress the risk of financial disaster due to clerical error discovered after the bid opening. Thus, even if the so-called "waiver" language of section 102.10 is given broader meaning than its contextual use justifies, it can be no more than a waiver of that particular withdrawal right granted under the bid instructions. It cannot have impact beyond the scope of that particular withdrawal right, especially in the absence of language expressly extending its effect to different kinds

of withdrawal rights. Put another way, where the withdrawal right created by statute is an extraordinary remedy afforded as an expression of legislative policy to redress a specific peril which is not discovered until after bid opening, it is absurd to view that right as terminated by inapt waiver language directed solely to a general right of withdrawal exercisable only prior to bid opening.

Under the foregoing analysis, the rule of Williams v. Wenger, 319 Pa. 73, 77, 1979 A. 242, 244 (1935) is not relevant. There is simply no real waiver provided under the bid instructions, or, alternatively, any such waiver does not impact on the statutorily created withdrawal right. More important, the "selection" rule of Stembridge v. State of Georgia, 343 U.S. 541, 547, 72 S.Ct.

834, 837 (1952), is not relevant because there is no rational foundation for the notion that the Pennsylvania Supreme Court "might" have predicated its judgment of affirmance on a non-federal ground which is on its face void of merit.

CONCLUSION

Appellee's Motion to Dismiss should be denied and probable jurisdiction should be noted as requested in Appellants' Jurisdictional Statement.

Respectfully submitted,

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